Tweddle Litho, Inc. *and* Local 289M, Graphic Communications International Union, AFL–CIO. Case 7–UC–552

June 13, 2002

DECISION ON REVIEW AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

The National Labor Relations Board, by a three-member panel, has considered the Employer-Petitioner's request for review of the Regional Director's decision deferring action on the Employer-Petitioner's unit clarification petition. The Employer-Petitioner's request for review is granted.

Having carefully considered the matter, we conclude, contrary to the Regional Director and our dissenting colleague, that this case involves a question concerning representation, and thus consideration of the unit clarification petition should not be held in abeyance pending arbitration.

The relevant facts are as follows: the Employer is a member of an employer association, which has a collective-bargaining agreement with the Union. At the Employer's facility in Clinton Township, Michigan, that agreement covers six employees, identified by the Employer as "bindery employees" (two janitors, one shipping and receiving clerk, and three miscellaneous shipping and receiving clerks). In April 2001, the Employer leased a new facility near its existing facility. At this new facility, the Employer employs 10 permanent and some temporary employees. The Employer describes the employees' duties at this new facility as packaging, labeling and shipping books received from the Employer's original facility to the Employer's "Big 3" auto producing customers. Another company had previously done such work for the Employer for many years, but when that company raised its price to perform the work, the Employer decided to do the work itself.

On June 4, 2001, the Union filed a grievance claiming that employees at the Employer's new facility were doing bargaining unit work. According to the grievance, which was attached to the request for review, the "Nature of Grievance" was that the Employer "failed and refused to treat new employees performing work covered by its current collective-bargaining agreement with the Union as being part of the bargaining unit . . . ." The "Settlement Desired" by the grievance was that the Employer "treat the employees at issue as part of the . . . bargaining unit." The Employer denied the grievance and shortly thereafter filed this UC petition seeking to clarify the existing bargaining unit to exclude the employees at the new facility. The Employer contends that the Board has exclusive jurisdiction over this case because it involves a matter of representation. Agreeing with the Union, however, the Regional Director deferred this case to arbitration and held the Employer's UC petition in abeyance. We find merit in the Employer's contention.

In *Marion Power Shovel*, 230 NLRB 576, 577–578 (1977), the Board held that "[t]he determination of questions of representation, accretion, and appropriate unit do[es] not depend upon contract interpretation but involve[s] the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than an arbitrator." See also *Williams Transportation Co*., 233 NLRB 837 (1977); and *Ziegler*, 333 NLRB No. 114 (2001). Under this precedent, we agree with the Employer that the issue posed by the grievance is whether the new employees are to be accreted to the contractual bargaining unit or added because they perform the same functions that historically have been performed by unit employees[1]—a representation issue for Board determination.

Our colleague suggests a two-step process, i.e., arbitration and then, if representation issues remain, Board intervention. We see no need to adopt this two-step process and thereby delay the handling of this case which presents, at its core, representation issues.[2]

Verizon Information Systems, 335 NLRB No. 44 (2001), is clearly distinguishable. In that case, the union and the employer had entered into a "Memorandum of Agreement" establishing a specific procedure for voluntary recognition outside of the Board's processes, including the right to have the unit issue decided by an arbitrator. The Board found that because the union elected to proceed under the agreement and derived benefits from it, the union was estopped from thereafter avoiding certain of the provisions of the agreement (i.e., arbitration) and seeking recognition through the Board's processes. Here, by contrast, no issue of estoppel is raised by the Employer's UC petition.

Accordingly, we remand this case to the Regional Director for a hearing on the issues raised by the petition.

Dated, Washington, D.C., June 13, 2002

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Peter J. Hurtgen, Chairman

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Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

Contrary to my colleagues, I believe that deferring to arbitration, at least initially, is the better course here. In

[1] See *Premcor, Inc.*, 333 NLRB No. 164 (2001).

[2] We acknowledge that there are contractual issues relevant to the representation case issue. The Board can consider these issues and resolve all of them in one proceeding.

this case, a question of contract interpretation *is* posed: whether the work performed by newly-hired employees at the Employer's distribution center is covered by the Employer's collective-bargaining agreement with the Union. Resolving that issue may, in turn, lead to representation-related questions, which under current law are matters for the Board. See, e.g., *Williams Transportation*, 233 NLRB 837 (1977). But that result is not inevitable. The parties may reach an accommodation. And even if the arbitrator resolves the contractual question in favor of the Union, I would not assume that he has no option except to order relief that is inconsistent with statutory policy, standards, and criteria. If that occurred, then the Board would not defer to the arbitrator's decision.

At this stage, however, I would allow the parties' agreed-upon grievance and arbitration procedure to operate. Cf. *Ziegler, Inc.*, 333 NLRB No. 114, slip op. at 4 (2001) (Member Liebman, dissenting in part) (unit clarification petition should be dismissed, in favor of allowing collective-bargaining process to address dispute, either within or outside grievance procedure). Only that step properly acknowledges the Union's contractual interest here. Accord: *Verizon Information Systems*, 335 NLRB No. 44 (2001) (dismissing representation petition, based on collectively-bargained procedure for voluntary recognition). If the Employer breached the agreement by hiring new employees to perform work that it had agreed would be performed only by bargaining unit employees, then the Union is surely entitled to a remedy. The Board's procedures should not be used effectively to foreclose the Union from pursuing that remedy.

Dated, Washington, D.C., June 13, 2002

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Wilma B. Liebman, Member

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